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IN THE

Supreme Court of the United States

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER, surviving partners of the copartnership of LAMBORN & COMPANY,
Petitioners,
(Plaintiffs Below),

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or Corporation, created by and under the Acts of Congress of the United States,
Respondent,
(Defendant Below).

PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Arthur H. Lamborn, Gerard P. Tameling, Charles C. Riggs, Henry B. Hutchings, Clarence G. Troup, Karl E. Lindgren, George H. Logan, N. Nelson Keen and B. Wheeler Dyer, for their petition herein respectfully show to this Honorable Court as follows:

I.

Pursuant to Section 5, Subdivision (b) of Rule XXXV of this Honorable Court, your petitioners respectfully apply for a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, rendered in the above entitled action on October 25th, 1926 (which decision and judgment followed and applied the decision of the said Court rendered herein on October 21st, 1924, reported 2 Fed. [2], 23), upon the following grounds:

(a) That the said decision and judgment of the United States Circuit Court of Appeals for the Fourth Circuit is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in the cases of

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn,*
Pennsylvania Milk Products Co. v. *Lamborn,*
L. Brenner Sons & Perloff v. *Lamborn,*

rendered on the 8th day of February, 1926, and reported in 10 Fed. (2d), 697, on the same subject matter, to wit: Identical shipment clauses contained in certain contracts and letters of credit to which your petitioners were parties, and arising in foreign and domestic commerce, as more specifically set forth and shown below herein.

(b) That the said decision of the United States Circuit Court of Appeals, Fourth Circuit, has decided an important question of local law arising in the States of New York, Pennsylvania and elsewhere in the United States, and that its said decision

is in conflict with decisions of the Supreme Court of the State of New York and of the Supreme Court of the State of Pennsylvania and certain other jurisdictions on the same subject matter, to wit: the said shipment clause in said contracts and letters of credit to which your petitioners were parties, as more specifically is set forth and shown below herein.

(c) That the said decision and judgment of the United States Circuit Court of Appeals of the Fourth Circuit has erroneously decided an important question of general law affecting the entire subject matter of purchase and sale contracts and shipments f. o. b. named place or port of destination, and that said decision and judgment is not only untenable but is in conflict with the weight of authority on the subject matter rendered by courts in the United States and England, as more specifically set forth and shown below herein.

II.

The decision and judgment sought to be reviewed is in direct conflict with certain decisions on the same matter rendered by the United States Circuit Court of Appeals, Second Circuit.

That in order to show to this Court that the said conflict of decision between said Circuit Court of Appeals has arisen on the same shipment clause, identical in phraseology, your petitioners beg leave to proceed with a brief description of the litigations above noted, taking up the three cases in the Second Circuit at the outset.

both because those cases set forth basic facts common to those three cases and to the case at bar and also because the three cases in the Second Circuit originated prior to the cause decided in the Fourth Circuit and because the decision and judgment of the United States Circuit Court of Appeals, Second Circuit, in said three causes was rendered and filed before the decision and judgment of the United States Circuit Court of Appeals for the Fourth Circuit, to review which this writ of certiorari is prayed for.

That the three causes

> *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn,*
> *L. Brenner Sons & Perloff* v. *Lamborn,*
> *Pennsylvania Milk Products Co.* v. *Lamborn,*

were actions at law brought against your petitioners by the purchasers of large quantities of sugar to recover the amount collected by your petitioners out of letters of credit posted by said purchasers to pay for the goods which your petitioners had contracted to ship from Java and to deliver to the purchasers at the Port of Philadelphia, U. S. A.

That in each of said cases the same form of printed or written contract had been entered into between your petitioners and said purchasers varying only as to quantity of merchandise, and in each of said contracts the shipment clauses were exactly alike, to wit:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

That in performance of said contracts your petitioners delivered to each of said purchasers its quantity of Java

sugar at the Port of Philadelphia from and out of the S. S. *West Cheswald;* and, drawing drafts, collected the contract price out of the letters of credit in each case as follows: *Matthew Smith Tea, Coffee & Grocery Co.* $144,283.83; *L. Brenner Sons & Perloff* $53,123.84; *Pennsylvania Milk Products Co.* $132,307.25.

That the facts in regard to the S. S. *West Cheswald* were as follows: Shipment of said Java White Sugar was effected on said steamship in the contract period of shipment, *i. e.,* August and/or September, 1920, at a Java port under a bill of lading which read as follows:

> "Steamship *West Cheswald,* port of discharge, New York, shipped by Ned. My. Voor Overzeehandel, consigned order, destination Port Said, option New York, party to be notified Messrs. Lamborn & Co., New York."

That your petitioners at that period of time were importing Java Sugar to American ports on a fleet of about twenty steamers, which were not owned or controlled by your petitioners, and were declaring steamers to purchasers and re-declaring them as accident, casualty, or other exigency of the business induced or required your petitioners so to do.

That at or about the time of the departure of the *West Cheswald* from Java, another ship, the S. S. *Chifuku Maru* also carrying a shipment of Java White Sugar consigned to your petitioners, had been declared to the said above mentioned three plaintiffs; but in the course of her voyage the *Chifuku Maru* met with an accident and was detained at Port Said, Egypt; so that it became necessary for your petitioners to employ the cargo carried by the S. S. *West Cheswald* in order to make deliveries within the lifetime of existing letters of credit.

That the S. S. *West Cheswald* at that time bound for New York, when about three days off the Atlantic Coast, was intercepted by your petitioners after due application to and consent by the United States Shipping Board, and caused to proceed at once to Philadelphia, where she arrived on December 15th, 1920; and from said ship deliveries of the purchased quantity of the sugar were made as above stated to the purchasers, plaintiffs in said three actions which we are describing.

The *Chifuku Maru* arrived at Philadelphia on February 4th, 1921.

That about March-April, 1921, the said three purchasers commenced in the United States District Court for the Southern District of New York the said three actions at law against your petitioners to recover back said amounts collected by your petitioners as above set forth, and that the principal ground for said recovery claimed by said plaintiffs, purchasers, was that your petitioners had no right to substitute the S. S. *West Cheswald* for the S. S. *Chifuku Maru* and that your petitioners' delivery and attempted delivery of Java Sugar from the S. S. *West Cheswald* was in violation of the shipment clause of the contract between your petitioners and said plaintiffs, purchasers; and subsequently in the course of said litigation the said plaintiffs also urged upon the United States Circuit Court of Appeals, Second Circuit, the nature of the bill of lading of the S. S. *West Cheswald,* the phraseology as to her first port of arrival and her diversion on the high seas to the port of Philadelphia, using in support of said contention the decision of the United States Circuit Court of Appeals, Fourth Circuit, reported in 2 Fed. (2d), 23, above referred to, and that on a motion for a judgment made by the plaintiffs in the form of a motion to

strike out your petitioners' answers, District Judge LEARNED HAND rendered on July 18th, 1921, a decision denying the plaintiffs' said motion, which is found reported in 276 Fed., 325, and a copy of which opinion is hereunto annexed and marked Exhibit "A."

That when the said causes came on for trial before the District Court upon the conclusion of the testimony and evidence, District Judge KNOX in October, 1924, directed judgment in favor of your petitioners and judgment was accordingly entered upon said direction.

Thereafter the plaintiffs in said three actions appealed to the United States Circuit Court of Appeals for the Second Circuit, and after argument of said appeals the said United States Circuit Court of Appeals, Second Circuit, on February 8th, 1926, unanimously affirmed the said judgments in favor of your petitioners, handing down an opinion by Circuit Judge HOUGH, which is found reported in 10 Fed. (2d), 697, a copy of which opinion is hereto annexed and marked Exhibit "B" (certiorari denied 271 U. S., 683, 685, 686). That by said opinion and decision, the United States Circuit Court of Appeals, Second Circuit, adjudged that your petitioners had a lawful right to make delivery of sugar under the said shipment clause from the said S. S. *West Cheswald.*

That the case at bar arose as follows:

That your petitioners had a contract with a concern known as T. S. Southgate & Company located at Norfolk, Virginia, for the purchase and sale and delivery at Philadelphia of the same Java White Sugar which it was provided should be shipped from Java in August and/or September, 1920. Said contract is found in full on page 128 of the record herewith submitted.

That the said contract was the same form of contract as had been executed and delivered between your petitioners and the plaintiffs in the above described actions in the United States District Court for the Southern District of New York, and that the shipment clause in the said contract with T. S. Southgate & Company read as follows:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia * * *."

That in accordance with the terms of said contract T. S. Southgate & Company caused a letter of credit to be posted by the National Bank of Commerce of Norfolk, Virginia, in the sum of $53,123.84 (see letter of credit, Rec., p. 122)[1] and that the shipment clause in said letter of credit was as follows:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia * * *."

That the form and wording of the shipment provisions in the said contracts involved in the three cases in the United States District Court for the Southern District of New York and found in the contract with said T. S. Southgate & Company of Norfolk, Virginia, and set forth in

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[1] Subsequent to its issue and on or about July 17th, 1920, some ten weeks before the sugar was shipped at Java, this letter of credit was modified so as to eliminate therefrom the requirement contained in the paragraph entitled "Documents," viz.:

> "And copy of Ocean Bill of Lading covering shipment Java to Philadelphia,"

so that as amended the said paragraph read:

> "Documents. Sight draft with invoice and order notify bill of lading attached."

(Plaintiffs' Exhibit 27, p. 123; Plaintiffs' Exhibit 47, p. 124.)

the letter of credit, posted by the said concern, T. S. Southgate & Company, were in all respects identical.

That your petitioners made delivery of the specified quantity of Java Sugar to T. S. Southgate & Company from the said S. S. *West Cheswald,* but that said T. S. Southgate & Company refused to take and pay for the said sugar.

That the National Bank of Commerce of Norfolk, Virginia having refused to honor its said letter of credit, your petitioners thereupon brought this action at bar in the District Court of the United States for the Eastern District of Virginia against the National Bank of Commerce of Norfolk, Virginia, for the sum of $48,009.81 based on the said letter of credit, wherein has been rendered the final judgment of the Circuit Court of Appeals for the Fourth Circuit which your petitioners now seek to have reviewed by this Honorable Court.

That upon the trial of the action at bar, a verdict was directed in favor of your petitioners. The defendant National Bank of Commerce appealed to the United States Circuit Court of Appeals for the Fourth Circuit. Said Circuit Court of Appeals handed down its decision on said appeal on the 21st day of October, 1924, reversing said judgment and directing a new trial. The opinion of the Court was by Circuit Judge Rose. It is reported in 2 Fed. (2d), 23. A copy thereof is hereto annexed and marked Exhibit "C."

That in reversing said judgment, the Circuit Court of Appeals, Fourth Circuit, held and decided that delivery of said sugar could not legally be made by your petitioners from the S. S. "West Cheswald" at Philadelphia, upon the ground that when her sugar cargo had been placed aboard

her at Java the said steamer was not at that time actually designed and intended to proceed to Philadelphia; and that your petitioners' duty under said shipment clause in said letter of credit obliged your petitioners to make delivery at said American port, i. e., Philadelphia, only from a steamer which, from the time of loading on board at a Java port or ports and from the moment of her departure from Java, was solely designed and intended to proceed direct to the designated port, i. e., Philadelphia.

That in so holding the Circuit Court of Appeals of the Fourth Circuit decided the obligation of your petitioners under said contracts and shipment clauses therein directly contrary to the said decision thereof of the United States Circuit Court of Appeals, Second Circuit; and that said conflicting decisions are based on identical purchase and sale contracts and on shipment clauses absolutely identical in form and contents and in respect to the same commodity delivered from the same steamship under the same bill of lading.

That the said judgment of the United States Circuit Court of Appeals (2 Fed. [2d], 23) Fourth Circuit, was not final. It reversed the judgment directed by District Judge GRONER and ordered a new trial of the action. Because it was an interlocutory judgment, and desirous of strengthening the case on the second trial, your petitioners served an amended notice of motion for judgment setting up certain additional matters which will appear from the amended notice of motion for judgment (Rec., p. 110).

That when the cause came on for retrial before District Judge GRONER your petitioners' offer of proofs and depositions taken in support of the amended allegations were excluded and exception taken. District Judge GRONER,

feeling constrained to follow the opinion of the United States Circuit Court of Appeals, Fourth Circuit, directed judgment for the defendant Bank, the National Bank of Commerce of Norfolk, Virginia, dismissing on the merits your petitioners' case against it.

That thereupon your petitioners took an appeal to the United States Circuit Court of Appeals, Fourth Circuit, from the said final judgment, and the same was argued on the 25th day of January, 1926, and was decided adversely to your petitioners, the opinion handed down on October 19, 1926, being annexed to this petition marked Exhibit "D," and from the judgment and decree entered on said affirmance on October 25, 1926, your petitioners now apply for a review by this Court by means of a writ of certiorari in accordance with the rules and regulations in such case made and provided.

III.

The said decision of the United States Circuit Court of Appeals, Fourth Circuit, in the above entitled action has decided an important question of local law arising in the States of New York, Pennsylvania and elsewhere in the United States, and its said decision is in conflict with decisions of the Supreme Court of the State of New York and of the Supreme Court of the State of Pennsylvania and certain other jurisdictions on the same subject-matter, to wit: the said shipment clause in said contracts and letters of credit to which your petitioners were parties.

That the decision of the United States Circuit Court of Appeals, Fourth Circuit, is directly contrary to the unani-

mous decision of the Supreme Court of Pennsylvania, in the case of

H. O. Wilbur Sons & Company v. *Lamborn*, 276 Pa., 479.

That was an action brought by a purchaser of Java White Sugar in the Court of Common Pleas, City of Philadelphia, to recover back the sum of $71,334, which had been collected by your petitioners against a letter of credit, upon allegations that your petitioners did not have the lawful right to make delivery of the said sugar from the S. S. *West Cheswald.*

That the contract provision and letter of credit provision for shipment was the same as the shipment provision in the letter of credit in the case at bar and in all the other cases which have been or shall be hereafter mentioned as cases wherein your petitioners were parties. That said case went up to the highest court of Pennsylvania and was decided by the Supreme Court of that State adversely to said Wilbur Sons & Company.

That the same objections and all of them to delivery by your petitioners from the S. S. *West Cheswald* discussed in the decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, were urged on the Supreme Court of the State of Pennsylvania, and were all overruled, and that Court determined that delivery of sugars from the said steamship was in conformity with the said shipment clause in the contract and letter of credit precisely as the United States Circuit Court of Appeals, Second Circuit, so decided.

That said decision of the United States Circuit Court of Appeals, Fourth Circuit, is also in conflict with the de-

cision of the Supreme Court of the State of New York in the case of

Williams Ice Cream Co. v. *Lamborn and Chase National Bank*, 120 Misc., 301,

decided by Mr. Justice WAGNER at Special Term, New York County (modified on another ground and complaint dismissed 210 App. Div., 179).

Said action involved delivery of sugar from the same S. S. *West Cheswald*, and the plaintiff (purchaser) in that case sought to avoid the contract because of the bill of lading of said steamship, her original port of destination, and her diversion to the Port of Philadelphia, as well as her substitution for the S. S. *Chifuku Maru;* but was unsuccessful in so doing.

That in the case of

J. Hungerford Smith Company v. *Lamborn*, Supreme Court, Monroe County, reported in 200 N. Y. Supp., 292,

the plaintiff (purchaser) commenced an action to enjoin your petitioners from recourse against a certain letter of credit posted under the contract on the ground that the substitution of the S. S. *West Cheswald* for the S. S. *Chifuku Maru* was an illegal act by your petitioners, and that your petitioners had no right to deliver the sugar from the S. S. *West Cheswald*. In denying the injunction (and thereby deciding the action) Mr. Justice SAWYER of the Supreme Court of the State of New York at Special Term, Monroe County, overruled the purchaser's objections and held them all to be untenable, and reference is respectfully made to his decision published in 200 N. Y. Supp., 292.

That in the Fall of 1920 eleven purchasers commenced actions against your petitioners in the Supreme Court to enjoin and prevent the collection by your petitioners of the purchase price of sugar sold by them to the said plaintiffs, and which contracts were about to be performed by shipment to the plaintiffs f. o. b. Philadelphia from the said S. S. *West Cheswald*, and to cancel and rescind the said contracts of purchase on the ground that your petitioners had no right to make delivery from the said S. S. *West Cheswald*, as the said steamship could not be used as a delivering vessel for the said S. S. *Chifuku Maru*.

That all of said plaintiffs' motions for injunctions were denied and the cases dismissed.

That the decisions in said cases were rendered as follows:

Pennsylvania Milk Products Co. v. *Lamborn;*
L. Brenner Sons & Perloff v. *Lamborn;*
Mollen-Thompson & James Co. v. *Lamborn;*
Matthew Smith Tea, Coffee & Grocery Co. v. Lamborn;
T. H. McLain Grocery Co. v. *Lamborn;*
W. E. Sheppard & Co. v. *Lamborn;*
T. S. Southgate & Co. v. *Lamborn (Action No. 2);*
Williams Ice Cream Co. v. *Lamborn;*

(All decided by Mr. Justice BURR, sitting at Special Term, New York County, reported in New York Law Journal, issue of January 4th, 1921);

Telling Belle Vernon Co. v. Lamborn;

(Decided by Mr. Justice COHALAN, sitting at Special Term, New York County, reported in New York Law Journal, issue of December 22nd, 1920);

Central Sugar Co. v. *Lamborn;*

(Decided by Mr. Justice BENEDICT, sitting at Special Term, Kings County, reported 200 N. Y. Supp., 499; affirmed by Appellate Division, Second Department, 195 App. Div., 909);

J. Hungerford Smith Co. v. *Lamborn;*

(Decided by Mr. Justice SAWYER, sitting at Special Term, Monroe County, reported 200 N. Y. Supp., 292).

That your petitioners further show that the contract between your petitioners and T. S. Southgate & Company was made and entered into in New York by your petitioners, and that the place of performance, *i. e.*, delivery of the goods under said contract and under the letter of credit in suit herein was the port of Philadelphia, State of Pennsylvania, and that the Supreme Court of each of those States has decided the legality of your petitioners' delivery of said sugar under said shipment clause in favor of your petitioners, and that every decision on the same question in both State and Federal Courts has been in favor of your petitioners, and that the decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, now sought to be reviewed, is opposed to and in conflict with all the other reported decisions and actual judgments rendered by any State and Federal Court on the same subject-matter.

That in the case at bar payment of the letter of credit issued by the National Bank of Commerce was to be made through the Bankers Trust Company of the City of New York, and that therefore the performance of the letter of credit, the contract in this action, was, by the parties, agreed to occur in the City and State of New York.

IV.

The said decision and judgment of the said United States Circuit Court of Appeals of the Fourth Circuit has erroneously decided an important question of general law affecting the entire subject-matter of purchase and sale contracts and shipments F.O.B. named place or port of designation, and that said decision and judgment is not only untenable but is in conflict with the weight of authority on the subject-matter rendered by the courts in the United States and England.

That the subject-matter, *i. e.*, a contract for a shipment f. o. b. Port of Philadelphia, U. S. A., involves one of the most extensive branches of commerce and presents one of the most important general rules of law applicable throughout the United States; and that the distinction between the principles of law applicable to contracts for shipment f. o. b. named port or place of destination and contracts c. i. f. has been ignored by the Circuit Court of Appeals, Fourth Circuit, or lost sight of, whereas said distinction is founded on vitally different elements of ownership and its unimpaired maintenance is of the utmost importance to the business world.

Your petitioners further show that the whole current of American and English authority, so far as reported, emphasizes the distinction between f. o. b. and c. i. f. contracts, and is opposed to the decision and judgment of the Circuit Court of Appeals, Fourth Circuit, in the case at bar, as follows:

In the case of

Harrison v. *Fortlage*, 161 U. S., 57,

the contract called for delivery "ex ship" at an American port. The steamer upon which the original shipment was to be made at the Philippine Islands was named in the contract. There, likewise, the contract provided for delivery to the purchaser at Philadelphia "ex ship." The steamer named in the contract, the *Empress of India* on account of stress of weather was unable to carry all of her cargo to destination and a portion of it was discharged at the Island of Bermuda whence it was carried to Philadelphia by another ship. Obviously there was a new bill of lading covering the shipment from Bermuda to Philadelphia, but this Court held that the seller had fully complied with the provisions of the contract, that the contract was satisfied by loading on board the *Empress of India* at Manila, and that subsequent transportation and delivery of the goods were to be governed by the general rules of maritime law.

In the case of

> *Lamborn et al.* v. *Log Cabin Products Co.*, 291 Fed., 435,

where the same form of contract between seller and purchaser existed and the shipment clause therein was of course identically the same as in the letter of credit in the case at bar, your petitioners had declared to the purchasers, Log Cabin Products Co., the S. S. *Morocco;* but that steamer met with a casualty in the Red Sea and was detained at Port Said and compelled to transship her cargo to the S. S. *Manica* which arrived safely at New York, the port of delivery, with said cargo. But the purchaser refused to accept tender of the said sugar; and, the letter of credit having expired, your petitioners sued said purchaser for the damages resulting because of its

refusal to accept and pay for the goods. In that case there appeared two bills of lading, one of the S. S. *Morocco* and the other of the S. S. *Manica*.

The purchaser defended the action before District Judge BOOTH (now a Circuit Judge, Eighth Circuit), on the ground that your petitioners were obliged to deliver the sugar from the S. S. *Morocco* and had not the right to deliver it from the steamer to which the cargo had been transshipped; and upon the further ground that the arrival of the S. S. *Manica* was subsequent to the date of expiration of the letter of credit. These objections were overruled by District Judge BOOTH and the right of your petitioners to make delivery from another steamer than that originally declared was fully sustained in the opinion reported as above.

In the case of

Ashmore & Company v. *C. S. Cox & Company*, Law Reports (1899), 1 Q. B. D., 436,

which was a case on a contract calling for delivery at port of destination, it appeared that the seller had failed to make shipment, that is loaded on board a sailer or sailers within the specified time. Lord Chief Justice RUSSELL writing the opinion of the Court intimated that this was not fatal, and that the sellers if they could find a ship in the Port of London, which had made the designated shipment, might have substituted and made delivery from the ship so found.

Precisely the same ruling was made by the Supreme Court in the State of Massachusetts in

Mann v. *Eastern Sugar & Products Co.*, 244 Mass., 100.

Therefore this Court and the Courts of Massachusetts and England have held in cases where delivery was to be made at the port of destination, that under a contract calling for shipment at a foreign port a direct or continuous voyage was not essential, but that the seller might make delivery at the port of destination of any goods which might be found in such port, and which had been loaded on board during the contract period.

That the cases cited in the opinion of the United States Circuit Court of Appeals, Fourth Circuit (by Rose, C. J.), are clearly distinguishable from the said current and weight of authority above set forth.

Bowes v. *Shand*, 2 App. Cas., 455; *Norrington* v. *Wright*, 115 U. S., 188; *Filley* v. *Pope*, 115 U. S., 213, were all cases where the seller had failed to make shipment in accordance with the terms of the contract of purchase and sale.

To this list also belongs the case of *The Manhattan*, 284 Fed., 310. In fact, in that case, default in supplying the designated ship was admitted and the question decided by the Circuit Court of Appeals was one of damages only.

Murray v. *Columbian Insurance Company*, 4 Johns. (New York) 443, was an action to recover back premiums paid on a policy of marine insurance where the ship did not make the voyage which was about to be insured.

Coming to the two other English cases in said opinion, *Landauer & Co.* v. *Craven & Speeding Bros.*, Law Reports (1912), 2 Kings Bench Division, 94, was a case arising on a cost, freight and insurance contract and was discussed and decided as such by the Kings Bench; and the remaining case cited, *Hansson* v. *Hamel & Horley, Ltd.* (1922), 2 App. Cases., 36, was also upon a cost, insurance and freight contract, and the discussion in the House of

Lords was as to the necessary requirements of performance by the seller under a cost, freight and insurance contract.

We beg leave to amplify this subject somewhat further but briefly in the petitioners' brief which is herewith submitted.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued under the seal of the Court directed to the United States Circuit Court of Appeals for the Fourth Circuit sitting at Richmond, Virginia, commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings had by the Circuit Court of Appeals in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided in the Act of Congress approved March 3, 1891, establishing the Circuit Court of Appeals and defining and regulating their jurisdiction, and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as may seem proper.

And your petitioners will ever pray.

LAMBORN & COMPANY,

By GEORGE H. LOGAN,
Petitioners.

United States of America,
Southern District of New York, } ss.:

GEORGE H. LOGAN, being duly sworn, deposes and says: That he is one of the petitioners herein; that he has read the foregoing petition by him subscribed, and that the facts stated therein are true to the best of his information and belief.

GEORGE H. LOGAN.

Sworn to before me this 17th day of January, 1927.

JOHN L. SHEEHAN,
(Seal) Notary Public,
Queens County.
Certificate filed in New York County.
Commission expires March 30, 1928.

WE HEREBY CERTIFY that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Dated January 17th, 1927.

LOUIS O. VAN DOREN,
EDWARD R. BAIRD, JR.,
HENRY G. CONNOR, JR.,
EDWARD S. BENTLEY,
Counsel.

IN THE

Supreme Court of the United States

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER, Surviving Partners of the Co-partnership of Lamborn & Company,
Petitioners
(Plaintiffs Below),

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or corporation, created by and under the Acts of Congress of the United States,
Respondent,
(Defendant Below).

BRIEF.

This case, we submit, comes precisely within the Supreme Court General Rule XXXV, Section 5, Subdivision (b).

Said section and subdivision of the rule reads as follows:

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local de-

cisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

This case, we submit, falls within each of the three classes of cases first mentioned in the rule as being properly subject to review by certiorari from this Court.

The petitioners beg leave to set out the first three classifications in the rule in each of which this case belongs, viz.:

1. This petition sets forth a direct conflict between the decision of the Circuit Court of Appeals, Second Circuit, and the decision of the Circuit Court of Appeals, Fourth Circuit, upon the same matter;

2. The petition shows that in the case at bar the Circuit Court of Appeals, Fourth Circuit, has decided, contrary to state decisions, an important question of law where the said state decisions and the said decision of the Circuit Court of Appeals, Fourth Circuit, concerned identical clauses in a uniform series of contracts;

3. Also, the decision sought to be reviewed is upon an important question of general law, involving in reality the whole subject-matter of shipments and deliveries f.o.b., both in domestic and foreign commerce; and said decision is untenable and is in conflict with the whole weight of authority on the said subject-matter.

We believe that it must have rarely, if ever, happened that there have been so many decisions of state and federal courts on one series of shipping contracts, as have been rendered by state and federal courts in this country on the Lamborn Java White Sugar contracts. The very shipment clause, word for word, construed adversely to Lamborn & Company by the decision of the Circuit Court of Appeals, Fourth Circuit, now sought to be reviewed, has been repeatedly adjudicated by state and other federal courts, *uniformly in favor of the contention of Lamborn & Company;* and the decision by the Circuit Court, Fourth Circuit, sought to be reviewed, stands alone in all that array of decisions as the one judgment holding that Lamborn & Company had not the right under said contract and shipment clause to make delivery to their purchasers from the steamer *West Cheswald.*

The decision of the Circuit Court of Appeals, Fourth Circuit, therefore, is opposed to all the other decisions in this country on the same clause and contract; and unless your petitioners can secure a review of it in this Court, they must not only suffer the loss of upwards of $50,000, but there remains and must always remain a direct conflict as to what the law is, as to the duty of importers in making delivery from beyond the seas under the terms of an f.o.b. contract at an American port.

So that, unless this case be reviewed and the question settled by the Supreme Court, the law on that subject matter in the whole extent of the Fourth Circuit will be one thing, while the law of the States of Massachusetts, New York and Pennsylvania, and of the Second Circuit will be another and a different thing; and importers and merchants of the United States, shippers generally doing

an international or interstate business, will not know, and cannot be advised, what the uniform law is which governs their contracts and determines their obligations in performing them.

POINT ONE.

The decision of the Fourth Circuit sought to be reviewed is in direct conflict with the decision of the Second Circuit.

When Lamborn & Company in 1920 sold in this country the Java sugars purchased by them abroad, they prepared and used a uniform printed form of contract. This contract contained the following provisions as to shipment and delivery to their American customers:

> "F.O.B. cars Philadelphia, Pa., landed weights * * * Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

The contract between Lamborn & Company and T. S. Southgate & Company in the case at bar was upon this printed form and contained the said provision. The contracts with Matthew Smith Tea, Coffee & Grocery Company, with the Pennsylvania Milk Products Company, and with L. Brenner Sons & Perloff, involved in the three cases in the Second Circuit, reported in 276 Fed., 325 and 10 Fed. (2d), 697, were likewise upon this printed form and contained the said provision.

The letter of credit issued by the National Bank of Commerce of Norfolk, Virginia, in the case at bar, which was supplied by T. S. Southgate & Company pursuant to said contract, likewise contained the said provision.

The sugar delivered to Matthew Smith Tea, Coffee & Grocery Company, to the Pennsylvania Milk Products Company and to L. Brenner Sons & Perloff, as well as to T. S. Southgate & Company, f.o.b. Philadelphia, all came from the same ship, *West Cheswald*, and had been carried by the *West Cheswald* from Java to Philadelphia under the same ocean bill of lading containing the clause:

"Port Said, option New York."

In the three cases in the Second Circuit, the respective banks which had issued the letters of credit duly honored them and paid Lamborn & Company's drafts; thereafter Lamborn & Company's customers, in order to assert their claim that Lamborn & Company had breached their contracts and had failed to deliver the sugar called for therein, brought suits against Lamborn & Company as for money had and received.

But in the case at bar, the National Bank of Commerce of Norfolk refused to honor its letter of credit and instructed the Bankers Trust Company of New York not to make payment under it. So that Lamborn & Company, as plaintiffs, brought the suit at bar against the National Bank of Commerce of Norfolk, Virginia.

The sole ground for denying Lamborn & Company a recovery herein was that, as the Fourth Circuit held, Lamborn & Company had failed to comply with the shipment provision of said letter of credit above quoted in that the sugar covered by the documents presented to the defendant Bank had not been shipped "from Java to Philadelphia" but had been shipped on the *West Cheswald* under an ocean bill of lading reading "Port Said, option New York." (The record of the case at bar shows the meaning of these words "Port Said, option New York"

and in the discussion under Point Three of the untenable nature of the decision of the Fourth Circuit, we shall state that explanation.)

The Court will observe on examining the record of the case that the Bankers Trust Company, after examination, declared that Lamborn & Company's documents, among which was the said bill of lading, were "in order" and so advised the National Bank of Commerce of Norfolk, and strongly urged the defendant Bank to honor its letter of credit and to permit the Trust Company in New York to make due payment thereunder.

When the three cases above referred to came on to be heard in the Circuit Court of Appeals, Second Circuit, that Court had before it the first decision (2 Fed. [2d], 23 of the Fourth Circuit), in the case at bar, and it was urged upon that Court that Lamborn & Company had failed to comply with the shipment provision of the contract for the reasons stated by Circuit Judge ROSE in that opinion.

But the Second Circuit refused to hold that Lamborn & Company had breached its contract. On the contrary the Second Circuit held that Lamborn & Company had performed it; that the shipment on board the *West Cheswald* was a shipment from Java to Philadelphia, hence that Lamborn & Company was entitled to retain the purchase money of the sugar. Circuit Judge HOUGH said:

> "Reduced to its lowest terms, Smith Company was entitled to a certain quantity of Java sugar f.o.b. Philadelphia, and shipped in August-September; that agreement was fulfilled."

Therefore, here is a situation, we submit, falling precisely within the first clause of Subdivision (b) of Section 5 of Rule XXXV, which provides for the granting of

a writ of certiorari "where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same subject-matter."

That this direct conflict may not be evidenced only by allegations of your petitioners or by argument of counsel, we have annexed to the petition the opinion of the Circuit Court of Appeals, Fourth Circuit, adhered to and confirmed by the final judgment of that Court now sought to be reviewed, and the opinion of the Circuit Court of Appeals, Second Circuit, in the three cases against your petitioners decided in that jurisdiction. So that from a perusal of the opinions of the two Circuits, the fact of the identity of the question and the fact of the existing conflict between the two Courts on the same matter may be self-evident.

We think that Judge HOUGH's comments on the decision of the Fourth Circuit in 2 Fed. (2d), 23, cannot affect either the existence or the reality of the conflict of the decision between the two Circuits.

The letter of credit in the case at bar provides "shipment to be made during August-September, 1920, at option of sellers from Java by steamer or steamers to Philadelphia." The contracts in the cases decided by Judge HOUGH in the Second Circuit provided "shipment to be made during August-September, 1920, at option of sellers from Java by steamer or steamers to Philadelphia."

These provisions do not differ by a single word or by a single mark of punctuation. Yet in the Second Circuit it was held that Lamborn & Company had complied with the said provision; while in the Fourth Circuit it was held that Lamborn & Company had not.

Therefore, we respectfully submit that there is no distinction between the cases in the Second Circuit and the case in the Fourth Circuit sought to be reviewed, and that Judge HOUGH's comments upon the decision in the Fourth Circuit were no more than an expression of respect to the Circuit whose decision was about to be rejected as unsound in law and fact.

POINT TWO.

The decision and judgment sought to be reviewed is in direct conflict with the decisions of local law existing in the State of Pennsylvania, where the purchase and sales contract was to be performed by delivering the sugar F.O.B. cars, and in the State of New York, where the letter of credit was to be performed, i. e., by the Bankers Trust Company making payment to Lamborn & Company on presentation of documents.

In the case of *Williams Ice Cream Co., Inc.* v. *Chase National Bank and Lamborn & Company* (*supra*), to which we referred in our petition, the contract was likewise upon the same printed form as in the case at bar, and contained the same shipment clause. The same objection against the legality of delivery from the *West Chesuald*, which was held fatal by the Circuit Court of Appeals, Fourth Circuit, was presented to the New York Court. But the Special Term (Mr. Justice WAGNER) held the point of no weight. He said, at page 305:

> "Plaintiff urges that the sugar was not a shipment from Java to Philadelphia, but to New York; * * * In other words, that a shipment is not the

course that a designated vessel takes, but a course intended that it should take. This refinement to me seems more one of sophistry than reason and carries with it failure of conviction."

Mr. Justice WAGNER dismissed the complaint, but without costs (120 Misc., 301). Upon appeal to the Appellate Division, however, the judgment was modified so as to dismiss the complaint with costs, and as thus modified, affirmed (210 App. Div., 179).

Again, Mr. Justice SAWYER of the New York Supreme Court, at Special Term at Rochester (Monroe County), decided that Lamborn & Company had the right to make delivery of these sugars from the *West Cheswald*: See *J. Hungerford Smith* v. *Lamborn*, 200 N. Y. Supp., 292.

Again, in a case which came before him at Special Term of the Supreme Court, New York County,

Telling Belle Vernon Co. v. *Lamborn*, New York Law Journal, December 22nd, 1920,

Mr. Justice COHALAN, in denying an injunction to restrain Lamborn & Company from collecting against a letter of credit, held in substance and effect that a delivery of sugar from the S. S. *West Cheswald* was lawful and in compliance with the contract.

A similar decision was handed down by Mr. Justice BENEDICT sitting at Special Term, Kings County, in the case of

Central Sugar Co. v. *Lamborn*, 200 N. Y. Supp., 499; affirmed without opinion 195 App. Div., 909.

Again, in eight cases which came before him at Special Term, New York County, Mr. Justice BURR (afterward of

the Appellate Division, First Department) in denying injunctions against Lamborn & Company, held that deliveries of sugar from the said S. S. *West Cheswald* complied with the contracts:

> *Pennsylvania Milk Products Co.* v. *Lamborn;*
> *L. Brenner Sons & Perloff* v. *Lamborn;*
> *Mollen-Thompson & James Co.* v. *Lamborn;*
> *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn;*
> *T. H. McLain Grocery Co.* v. *Lamborn;*
> *W. E. Sheppard & Co.* v. *Lamborn;*
> *T. S. Southgate & Co.* v. *Lamborn* (Action No. 2);
> *Williams Ice Cream Co.* v. *Lamborn.*
>
> (All reported in New York Law Journal, issue of January 4th, 1921.)

Again, in Pennsylvania, the state of delivery, the same contention was made in the case of

> *H. O. Wilbur Sons & Co.* v. *Lamborn,* 276 Pa. State, 479.

The contract was upon the same printed form and contained the same shipment clause which we have described. There it was argued with great learning and ability through all the courts of Pennsylvania that Lamborn & Company could not lawfully make delivery of said sugar at the port of Philadelphia from the said S. S. *West Cheswald* owing to the nature and contents of her bill of lading. But once more the point was held not to have been well taken, the Supreme Court of Pennsylvania saying:

> "Some point is made * * * of the fact that the *West Cheswald* was originally bound for New York and diverted to Philadelphia. We think this di-

> version was of no consequence, under the contract. Plaintiff was concerned only with the delivery of the merchandise, that there should be no delay in its arrival. It was delivered as the result of a continuous voyage from Java to Philadelphia. These contracts do not say that the sugar shall be shipped by continuous voyage from place of shipment to destination, what they provide is that the shipment shall be 'from Java by steamer or steamers to Philadelphia.'"

The same view thus expressed by the courts of New York and Pennsylvania was taken by United States District Judge LAWRENCE D. GRONER upon the first trial of the case at bar. He said:

> "The letter of credit is complied with, it seems to me, by the shipment in a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I cannot imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage was commenced, it seems to me that it would be a compliance with the contract. It would be all that reason and fair play and justice would require". (Rec., p. 54).

The disregard by the Circuit Court of Appeals, Fourth Circuit, of the law so laid down was not inadvertent. The cases above referred to were urged upon it in behalf of Lamborn & Company. They were expressly noticed and repudiated by Circuit Judge ROSE in his opinion. He said:

> "That point of view is in substance the same as that which has commended itself to the Courts

> which have heretofore passed upon the precise question now before us. They have thought that if within a reasonable time the sugar was carried to Philadelphia by a vessel which in fact sailed from Java to Philadelphia it made no difference that when the shipment was made in Java, it was upon a ship which was bound on a voyage not to Philadelphia but on one to New York" (Rec., p. 87).

Therefore, we submit that there was in this case a deliberate repudiation by the Fourth Circuit of the local law as laid down in the States of New York and Pennsylvania; and that the decision here sought to be reviewed is in conflict therewith, and was recognized and intended so to be by the United States Circuit Court of Appeals, Fourth Circuit.

Consequently we submit that this case falls within the second clause of Subdivision b of Section 5 of Rule XXXV of this Court which permits the issuance of a writ of certiorari to a Circuit Court of Appeals which "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Here the conflict cannot be termed "probable." It is deliberate and expressed.

POINT THREE.

The decision and judgment sought to be reviewed has decided an important question of general law in a way untenable and in conflict with the weight of authority, both in America and England.

The volume of interstate and international business conducted by contracts f.o.b. or c.i.f. is incalculable. The initials f.o.b. and c.i.f. are as common in use and as well understood by merchants as the alphabet.

But like all fundamental things, they differ widely in meaning and effect.

Where a merchant sells f.o.b. named port or place, he retains title and ownership of the goods until they are delivered to the carrier, until they are placed "free on board" ship or freight car or other carrying vessel. They are, until that delivery is made, the merchant's goods, his own and no one else's.

But where the sale is cost, freight and insurance, commonly here called c.i.f., the goods are the purchaser's from the moment of delivery to the carrier, of the payment of the freight, and the taking out of the insurance.

So that if these Lamborn contracts had been c.i.f. contracts, the goods from the moment of loading at Java would have been the purchaser's goods. Insurance would have had to cover a definite voyage, and freight would have been paid for that definite voyage, and Lamborn & Company's interest in the goods and in the bill of lading would thereupon have ceased at Java.

But being f.o.b. Philadelphia, Lamborn & Company retained title and ownership of the goods until they had reached Philadelphia, and until they had been loaded on board the railroad cars. Being f.o.b. Philadelphia, the ownership of the goods was in Lamborn, the bill of lading was theirs, the control of the goods was theirs, and the entire obligation set out in their contract was, as pointed out in the Second Circuit, delivery to the purchaser at Philadelphia of Java White Sugar, shipped in due season (the stipulated months from a Java port). Hence the goods were Lamborn & Company's, the bill of lading was theirs, the right of insurance was theirs, and the purchaser's title to the property accrued and came into ex-

istence for the first time when the sugars were loaded on board railroad cars at Philadelphia. Except for the decision of the Fourth Circuit in the case at bar now sought to be reviewed, every reported case in the United States and in England, where the subject-matter of the controversy was a contract f.o.b. named American or English port, has uniformly upheld the right of the importer to make delivery from any ship which reached the port or was in the port, provided she carried the stipulated goods and that they were shipped in the agreed foreign country, that is, laden on board, within the agreed period of time; quite regardless of whether it was one ship or another that carried them, and quite regardless of the voyage the ship had made.

There never has been a departure from this rule, until the decision was rendered which is now sought to be reviewed. There has never been a decision to the contrary in either American or English jurisdiction.

The cases cited by Mr. Benjamin in his work on Sales (5th Edition, pp. 588-9) supposed by many to be decisions denying the right of substitution of vessels, are not such decisions. We refer to:

Reuter v. *Sala*, Law Reports 1879, 4 Com. Pleas Div., 239;
Busk v. *Spence*, 4 Camp., 329 (1815);
Graves v. *Legg*, 1854, 9 Exch., 709.

Not one of them is a case against the use of one vessel rather than another. *All were cases where there was a plain violation of express language of the contract, either in respect to shipment, i. e., lading, or in respect to the declaration of vessels within the agreed period of time.*

On the other hand, the decisions holding that the importer performing an f.o.b. contract calling for delivery at a certain American or English port, might make delivery off of any vessel which carried the goods, shipped on her in the time stated, form an unbroken line of authority from early times down to the present day and include about forty of the *Lamborn* cases.

Thornton v. *Simpson*, 6 Taunt., 556;

Ashmore & Co. v. *C. S. Cox & Co.*, Law Reports 1899, 1 Q. B. D., 436;

Harrison v. *Fortlage*, 161 U. S., 57;

Carver v. *Sassoon*, 17 Com. Cases, 57;

El Reno Wholesale Grocery Co. v. *Lamborn* and 28 other cases decided simultaneously therewith, Special Term, New York County, New York Law Journal, December 15th, 1920;

Telling-Belle Vernon Co. v. *Lamborn, et al.*, New York Supreme Court, New York County, New York Law Journal, December 22nd, 1920;

Central Sugar Co. v. *Lamborn*, 200 N. Y. Supp., 499; affirmed 195 App. Div., 909;

Pennsylvania Milk Products Co. v. *Lamborn* and six other cases decided simultaneously therewith, New York Supreme Court, New York County, New York Law Journal, January 4, 1921;

J. Hungerford Smith Co. v. *Lamborn*, 200 N. Y., Supp., 292;

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn* and two other cases decided simultaneously therewith, District Court, Southern District of New York, 276 Fed., 325;

Lamborn v. *Log Cabin Products Co.*, 291 Fed., 435;

Lamborn v. *National Exchange Bank of Anderson, Indiana*, United States District Court, District of Indiana, ANDERSON, U. S. D. J.;

H. O. Wilbur Sons & Co. v. *Lamborn*, 276 Pa. State, 479;

Williams Ice Cream Co. v. *Lamborn*, 120 Misc., 301; 210 App. Div., 179;

Mann v. *Eastern Sugar & Products Co.*, 244 Mass., 100;

Gambrill Mfg. Co. v. *American Foreign Banking Corporation and E. R. Sherburne Co.*, 194 App. Div., 425;

Pennsylvania Sugar Refining Co. v. *Czarnikow Rionda Company*, Circuit Court of Appeals, Third Circuit, 245 Fed., 913;

Iasigi v. *Rosenstein*, 141 N. Y., 414;

Cunningham v. *Judson*, 100 N. Y., 179;

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn and two other cases decided simultaneously therewith*, Circuit Court of Appeals, Second Circuit, 10 Fed. (2d), 697.

This rule thus firmly and widely established in American and English law, that an importer operating under a contract f.o.b. Port of Philadelphia or Port of London or Port of New York, may make delivery at said port from any available vessel, carrying the goods which were shipped in time, is not in conflict at all with the well known decisions of this Court and of England that the shipment of the goods must be in time, *i. e.*, the goods must be laden on board at the foreign port or wherever

else the shipment was to be made, within the time specified by the contract and wholly within that time. We refer to such cases as

Bowes v. *Shand*, L. R. 2, App. Cases 455;
Filley v. *Pope*, 115 U. S., 213;
Norrington v. *Wright*, 115 U. S., 188.

In all of those cases facts were present showing that the seller had failed to make the agreed shipment. This, we submit, is an utterly different branch of the law. In *Bowes* v. *Shand*, the rice had been not wholly shipped within the designated months. In *Norrington* v. *Wright*, the rails had not been shipped in the designated quantities within the designated months; and in *Filley* v. *Pope*, the Scotch iron had not been shipped from the named port but from another than that stipulated in the contract. If the petitioners had shipped the sugar from India instead of from Java that case would have applied. But it had no relation to the subject-matter.

The opinion of the Fourth Circuit (by Circuit Judge Rose, 2 Fed. (2d), 23), affirmed and followed into final judgment by the decision of the Fourth Circuit sought to be reviewed, while refusing to follow the numerous English decisions on f.o.b. contracts and shipments, and the very many state and federal decisions directly on the Lamborn shipment clause under the Lamborn f.o.b. contracts, failed to cite a single authority either in American or English law, that Lamborn & Company had not the right to make delivery at Philadelphia of this sugar from the *West Cheswald* because her bill of lading contained the words "Port Said, option New York" covering destination, instead of the words "Philadelphia, Pa."

The words "Port Said, option New York" are testified

to in the record before this Court as meaning this: That within a certain time of the arrival of the vessel at Port Said, Lamborn & Company had under its bill of lading the option to send this vessel to any other port, and that failing the exercise of the option she would then proceed as a matter of course to New York (Rec., p. 197). So that when this ship was loaded at Java and proceeded towards Port Said, Lamborn & Company had the right, if they chose, to direct her to go to Philadelphia instead of New York. She was destined for no particular port but could go to any one. She was carrying Lamborn & Company's sugars, out of which they could make delivery at any port where they had agreed to deliver sugars so laden.

The objection to this is, we submit, so tenuous, indeed absurd, that it is difficult to discuss it. Mr. Justice WAGNER dismissed it as sophistry. District Judge GRONER said in substance that the objection involved injustice and unfairness. The Second Circuit said bluntly that the ship performed the contract. The Supreme Court of Pennsylvania said, in effect, that Lamborn had made no contract for a direct voyage, but that even if the Lamborn contract had called for a direct voyage from Java to Philadelphia, that court would not necessarily have held that the *West Cheswald* had failed to make such a direct voyage.

But the Lamborn contract with T. S. Southgate & Co. and the shipment clause of the letter of credit issued by the defendant National Bank of Commerce *did not anywhere specify or stipulate for a direct voyage from Java to an American port.*

One reads the opinion of the Circuit Court, Fourth Circuit, again and again, in a vain attempt to find therein the substance to the objection.

The learned Circuit Judge who wrote that opinion did attempt to formulate some basic ground, some sort of reason why he deemed it necessary to hold that we could not deliver from the *West Cheswald*. It is, we submit, if found anywhere, to be found in the following words:

> "Now it is true, as it is pointed out by learned counsel for the seller that the contract here is not a c.i.f. contract, *but it is one under which the buyer has an insurable interest and is therefore one which so far as this question is concerned governed by the same principle*."

But this stated reason is utterly fallacious and entirely inadequate to change an f.o.b. contract Philadelphia into a c.i.f. contract Java port.

We submit that the purchaser of this sugar f.o.b. Philadelphia had no insurable interest *in the sugar* as long as it was Lamborn & Company's. It was our sugar until delivered aboard railroad cars at Philadelphia. The purchaser had no insurable interest in our goods.

But the purchaser, like any other purchaser, could have insured his *profits* (circumstances permitting it at the time of his application for such insurance) and on the re-trial of this case petitioners by amendment and by competent expert evidence and documents under the amended notice of motion for judgment sought to prove that any right of the purchaser T. S. Southgate & Co. to insure its profits under its contract with Lamborn & Company was not in the least impaired by the nature of the bill of lading of the S. S. *West Cheswald* which carried the sugar or by her diversion off the coast of New Jersey to the port of Philadelphia there to make delivery. (See amended notice of motion for judgment, p. 110; see deposition of Richard Jones and exhibits attached, Rec., p. 197).

So that if alleged interference with the purchaser's right to insure his profits was the reason, the basic ground for the decision of the Fourth Circuit, it was a fallacy. It was controverted by the practice of insurance of profits, by the rules of the great insurance bodies of the Atlantic coast and of England, and it was controverted by the very forms and contents of binders and policies which are in use in the business of insurance of profits and which provide on their face for substitution of steamers and for diversion of the carrying vessel and her entering into other ports or making a different voyage. (See deposition of Jones and exhibits.)

We submit the Court will find in this record clear evidence on the subject of insurance of profits, clear evidence that the purchaser, T. S. Southgate & Company's right to insure profits (if they could have done so under the circumstances) was not prejudiced or impaired and could not have been prejudiced or impaired to the slightest degree by the nature of the bill of lading of the S. S. *West Cheswald*, by her stated designation Port Said, option New York, or by her diversion on the high seas to the port of Philadelphia.

We submit this error should no longer persist, and that this Court should correct it.

Nor is there a decision in the books (and counsel writing this brief have examined every reported case on the right and practice of insuring profits under a contract of purchase and sale which can be found in the English and American law books) which holds or has ever held that the purchaser under an f.o.b. contract, Philadelphia, such as the Lamborn contract in this case, had any right of insurance of the goods on board the vessel; nor is there a case in the books which holds (except the Circuit Court

decision of the Fourth Circuit now sought to be reviewed) that the purchaser's right to insure his profits under a purchase and sale contract covering goods to be imported by the seller and delivered f.o.b. American port to the purchaser, was impaired or prejudiced to the slightest degree by transshipment of the goods, by the port or ports of destination of the vessel or vessels, or by the ship's diversion from one port to another.

Counsel flatly say that no such case or cases exist.

The decision of the Fourth Circuit, ignoring *Harrison* v. *Fortlage, supra,* overruling District Judge HAND in *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn, supra,* and Mr. Justice SAWYER in *J. Hungerford Smith Co.* v. *Lamborn, supra,* and Mr. Justice WAGNER in *Williams Ice Cream Co.* v. *Lamborn, supra,* the Supreme Court of Pennsylvania in *H. O. Wilbur Sons & Co., Inc.* v. *Lamborn, supra,* and all the other cases which we have above mentioned defining the seller's obligation under f.o.b. contracts, is undoubtedly based on two things: (1) the principle decided in *Bowes* v. *Shand, Norrington* v. *Wright* and *Filley* v. *Pope,* that the shipment must be made in time and in the specified quantity; and (2) on the assertion that the purchaser's right to insure the sugar, brought the case within the rule of c.i.f. contracts and was violated by the shipment made on the *West Cheswald.*

There can be no doubt that the decision of the Fourth Circuit, sought to be reviewed, was written about the case of *Filley* v. *Pope.* It is a misapplication of that case.

There can be no doubt that the dictum in that case concerning insurance contained in the opinion of Mr. Justice GRAY, namely:

> "* * * the buyer would have an insurable interest in the iron during the voyage by reason of

> the title which would accrue to him under the contract on arrival and delivery and of the profits that he might make in case of a rise in the market. 3 *Kent's Commentaries*, 276; *French* v. *Hope Insurance Co.*, 16 Pickering 397; *Eastern Railroad* v. *Relief Insurance Co.*, 98 Mass. 420, 423."

was the cornerstone of said Fourth Circuit's decision. It follows that we must examine the source and origin of that dictum.

Chancellor KENT in 3 *Kent's Com.*, 276, summarized the decision of the House of Lords in the case of *Lucena* v. *Crauford*, 5 Bosanquet & Pullers, 269, to the general effect that "commissions to become due to public agents and all reasonable expectation of profits, were insurable interests."

The Chancellor's distinguished Editor (6th Ed.), cited *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass., 420, 423. In this case the opinion of the Massachusetts Supreme Court was written by Judge GRAY. It was not an action on an insurance policy insuring profits. It was an action on a *fire* insurance policy insuring the railroad company against "their liability for loss and damage by fire occasioned by sparks from railroad engines to property of others situated on lands not owned or occupied by the insured."

In the course of his opinion in the case, Judge GRAY said:

> "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself. 3 *Kent's Com.* (6th ed.) 276; *Insurance Co.* v. *Chase*, 5 Wallace, 509, 513; *Wilson* v. *Jones*, Law Rep. 2 Exch., 150, 151."

Insurance Co. v. *Chase*, 5 Wallace, 509, need not be discussed, as it was not a case of insurance of profits; *Wilson* v. *Jones*, Law Reports, 2 Exch., 139, was an action on an insurance policy taken out by a shareholder in the Atlantic Telegraph Company, involving the laying of the first submarine cable. *Lucena* v. *Craufurd*, was a case of the insurance of the commission for the sale of Dutch property under an English statute, 35 George III, Chapter 80, Section 21, of Dutch ships actually seized under orders of the British Government. It had nothing to do with the insurance of profits. *French* v. *Hope Insurance Co.*, 16 Pickering, 397, was an action to recover on a policy of insurance. It is enough to say that the assured had bought and paid for a one-half interest in the cargo.

The foregoing being the real nature of the cases referred to by Mr. Justice GRAY when he read the decision in 1868 for the Supreme Court of Massachusetts in the case of *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass., 420, we find the same citations by him in his opinion of the Court in *Filley* v. *Pope*, namely: 3 *Kent's Commentaries*, 276, *French* v. *Hope Insurance Company*, 16 Pickering, 397, and *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass., 420.

And curiously enough when the very learned and distinguished Justice came to write for the Court in *Harrison* v. *Fortlage*, he again cites, as authority for the alleged insurable interest, the same cases, namely: *Insurance Co.* v. *Chase*, 5 Wallace, 509-513; *Filley* v. *Pope*, 115 U. S., 213-220; *Wilson* v. *Jones*, L. R., 2 Exch., 139, 3 *Kent's Commentaries*, 276.

So that we very respectfully submit that the cases cited by Mr. Justice GRAY were not based on the practice and business of insurance of profits, did not involve any such

contract and were not in a single instance a case where profits had been insured by a purchaser. And that the learned Justice consistently adhered to the same citations from 1868 down to at least *Harrison* v. *Fortlage* in 1895.

Now when we come to the simple truth, the plain fact that the purchaser's right to insure profits under this Lamborn contract and on any other contract like it, is not vitally concerned with the terms of the original loading or with the name of the ship or with its voyage or course, but that it stands unimpaired, as good as ever, whether it be one ship or another, whether there be a deviation or not, whether the name of the vessel be changed, it is apparent that the reason sought to be found in the subject-matter of insurance of profits by a purchaser for holding that there was an implied obligation in our contract, that the loading should be originally for Philadelphia and that the ship should proceed direct to that port, disappears.

Therefore, we submit the case at bar falls precisely within the third of the first three clauses of Subdivision (b) of Section 5 of Rule XXXV, which provides for the granting of a writ of certiorari, where a Circuit Court of Appeals "has decided an important question of general law in a way probably untenable or in conflict with the weight of authority."

POINT FOUR.

The writ of certiorari prayed for by the petitioner should be granted and the decision and judgment of the Circuit Court of Appeals, Fourth Circuit, in the case at bar should be reviewed by this Court.

Respectfully submitted,

LOUIS O. VAN DOREN,
EDWARD B. BAIRD, JR.,
HENRY G. CONNER, JR.,
EDWARD S. BENTLEY,
Attorneys for Arthur H. Lamborn, *et al.*, Petitioners.

EXHIBITS.

PAGE

"A"—Opinion of District Judge Learned Hand in the case of Matthew Smith Tea, Coffee & Grocery Co. *v.* Lamborn (and two other cases decided simultaneously therewith), rendered in the United States District Court, Southern District of New York, reported 276 Fed., 325 47

"B"—Opinion of Circuit Judge Hough in the case of Matthew Smith Tea, Coffee & Grocery Co. *v.* Lamborn (and two other cases decided simultaneously therewith) rendered in the United States Circuit Court of Appeals for the Second Circuit, reported 10 Fed., 2nd, 607 50

"C"—Opinion of Circuit Judge Rose in the case of National Bank of Commerce of Norfolk *v.* Arthur H. Lamborn, *et al.*, rendered in the United States Circuit Court of Appeals, Fourth Circuit, reported 2 Fed., 2nd, 23..... 57

"D"—Opinion of Circuit Judge Rose in the case of Arthur H. Lamborn, *et al. v.* The National Bank of Commerce of Norfolk, Virginia, rendered in the United States Circuit Court of Appeals, Fourth Circuit, reported 15 Fed., 2nd, 473 74

Exhibit "A."

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MATTHEW SMITH TEA, COFFEE & GROCERY COMPANY

against

ARTHUR H. LAMBORN, *et al.*, copartners doing business under the firm name and style of LAMBORN & COMPANY.

LEARNED HAND, D. J.: Under the State practice the motion would be denied because none of the articles of the answer objected to could possibly embarrass the plaintiff on a trial. The State courts are always loath to undertake the reformation of pleadings, by paring and pruning, for the same reasons which would have deterred a lesser hero than the son of Alemene from undertaking his twelve labours. However, the plaintiff has presented the substance of the case upon this motion and cannot complain, if I decide it upon the merits against it.

None of the cases cited appear to me to touch the situation except Thornton *v.* Simpson, 6 Taunt 556, and two decisions in State courts upon this very contract. The whole case turns upon whether the defendant had the right to substitute the *West Cheswald* for the *Chifuku Maru*. I think that it had. The contract was for the sale of sugar by weight and quality, to be shipped from Java August-September, 1920, by steamer or steamers to Philadelphia, "Names of such steamers to be declared later. Should steamer or steamers declared against this contract fail to arrive at port of destination for any cause, sellers are relieved of responsibility under this contract."

Now it is clear that without the clause just quoted the seller would have been obliged generally to deliver. The sale was of fungibles and not of a cargo, already loaded on a given ship. Moreover, the seller might withhold his declaration of the steamers for as long as he chose. The case is not like Steinhardt *v.* Bingham, 182 N. Y. 326, where the declaration had to be within five days after bill of lading received. However, for as long as he did withhold, he remained generally liable. His declaration limited his obligation by excusing him in case the declared steamer should "fail to arrive." Hence the defendant is right in saying that the clause was for the seller's benefit only, Neill *v.* Whitword, 18 C. B. (N. S.), 435, Harrison *v.* Fortlage, 161 U. S. 57, 64. Clearly under this contract the buyer could have no interest in the particular ship on which the sugar arrived, so long as it was shipped "August-September."

I do not find it necessary to hold that, having once unconditionally declared a steamer, the seller could substitute another in every conceivable circumstance. For example, if the *Chifuku Maru* had been unconditionally declared and then lost, it perhaps would be reasonable that the buyer should be excused, because otherwise the seller could hold him if the price fell, though he could not hold the seller if it rose. Yet even then, it must be remembered that the contract does not read "no arrival, no sale." It is specifically a release only of the seller.

However that may be, the *Chifuku Maru* was not lost and was in no danger of loss, and the case seems to be within Thornton *v.* Simpson, *supra,* as well as the decisions on this contract of Mr. Justice SAWYER and Mr. Justice SHOEMAKER. If these be right, the seller could substitute, unless because the *West Cheswald* being nearer port, was less likely to be lost. That appears to me a

fanciful distinction, even assuming that the seller would not have had the right to put another cargo to the buyer, had the *Chifuku Maru* been actually lost. Hence I should think that even if the seller had made an unconditional declaration, Thornton *v.* Simpson, *supra,* was applicable, and he might substitute as he did, the buyer's position being in effect unchanged.

But the seller never made an unconditional declaration and the point does not arise. In his letter of August thirtieth, he expressly reserves the right to substitute another vessel. This he had the right to do, because he was only to declare "later." His letter amounted to saying that he then intended to ship by *Chifuku Maru* and *Washington Maru,* but might later decide to ship by another vessel. The buyer, having no right to a declaration at any given time, lost nothing by this. Nor did his letter of September twenty-ninth change this situation. The only "declaration" under the contract was on August thirtieth, "We hereby declare," etc. The second merely specified the time of sailing of the *Chifuku Maru* already provisionally declared. It is to be read with the first letter and is not to be taken as modifying its terms. The first alone was an act under the contract. On December thirteenth, when the substitution was made, I think the reservation contained in the original declaration was still in effect.

As to the custom pleaded in the Twenty-ninth article of the answer, it seems to me so clear that it does not contradict the contract, that I need do no more than allude to it.

The defense is entirely good in law and the motion is denied for that reason.

July 18, 1921.

D. J.

Exhibit "B."

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Before—Hon. HENRY WADE ROGERS,
Hon. CHARLES M. HOUGH,
Hon. MARTIN T. MANTON, Circuit Judges.

MATTHEW SMITH TEA COFFEE AND GROCERY COMPANY,
Plaintiff-in-Error and below,

v.

ARTHUR H. LAMBORN, *et al.*, trading as LAMBORN & CO.,
Defendants-in-Error and below.

THE PENNSYLVANIA MILK PRODUCTS CO.,
Plaintiff,

v.

ARTHUR H. LAMBORN, *et al.*, trading as LAMBORN & CO.,
Defendant.

LOUIS BRENNER, *et al.*, trading as L. BRENNER, SONS AND PERLOFF,
Plaintiffs,

v.

ARTHUR H. LAMBORN, *et al.*, trading as ARTHUR H. LAMBORN & CO.,
Defendants.

Writs of error to judgments entered in the District Court for the Southern District of New York.

These cases were tried together, and except for variations in names and quantity of goods concerned are alike. In all both parties moved for a directed verdict, the Court granted the defendants' motions, whereupon plaintiffs took these writs. The facts productive of the points of law involved are found in the evidence relating to the action of the Smith Company, as follows:

In April, 1920, Lamborn and Smith Company entered into a written contract for the sale by Lamborn of a considerable quantity of Java white sugar, concerning which it was provided that payment was to be made

> "by net cash on presentation of sight draft with invoice and bill of lading attached in New York. Buyers to open * * * confirmed irrevocable letter of credit in favor of Lamborn & Co."

at a named bank.

The written contract continued thus:

> "Shipment.
> Shipment to be made during August-September, 1920 at option of the sellers from Java by steamer or steamers to Philadelphia, Pa. Names of such steamer or steamers to be declared later. Should steamer or steamers declared against this contract fail to arrive at port of destination for any cause, sellers are relieved of responsibility under this contract."

During August-September, 1920, Lamborn shipped from Java sugar of the kind described and in amount sufficient to fulfil the bargain with Smith Company, on several steamers, to wit, at least the *West Cheswald* and the *Chifuku Maru.*

On August 30, 1920 Lamborn advised Smith Company in writing thus:

> "We hereby declare that the steamers *Chifuku Maru* and *Washington Maru or substitutes* will carry"

the sugar contracted for by Smith Company.

On September 29, 1920, Lamborn advised Smith Company in writing thus:

> "We have received advices that the SS *Chifuku Maru,* carrying your Javas * * * sailed from Java August 22 and is due to arrive the latter part of October."

Chifuku Maru broke down, had to stop at Port Said, and was subjected to very great delay, though she ultimately arrived in Philadelphia having on board the sugar that had been intended for Smith Company and the other plaintiffs-in-error.

Owing to the delay in repairing the *Chifuku Maru,* Lamborn notified Smith Company in writing on December 13, 1920, that owing to the delay aforesaid,

> "We hereby declare the steamer *West Cheswald* carrying the same quality of sugar and having made the same shipment from Java in fulfilment of your contract, which steamer is expected to arrive in Philadelphia this week."

The *Cheswald* did arrive with the same kind of sugar on board shipped at the same time and Smith Company refused it, but under the irrevocable credit above referred to Lamborn, producing proper shipping documents, was paid, and Smith Company brought this action to recover the sale price from Lamborn on the ground that Lamborn had not fulfilled his contract.

By written notification before suit, and by pleading, Smith Company's sole assigned reason for refusing sugar and suing for the sale price is that having declared *Chifuku Maru* as carrying Smith Company's sugar Lamborn had no right to change the declaration and tender sugar *ex West Cheswald.*

LEAVITT J. HUNT and H. VICTOR CRAWFORD, for Plaintiffs-in-Error;

LOUIS O. VAN DOREN, ALFRED C. B. MCNEVIN and EDWARD S. BENTLEY, for Defendants-in-Error.

HOUGH, C. J.:

Lamborn sold Java sugars f. o. b. Philadelphia to many persons, and apparently exacted as many irrevocable credits covering payment to him for the same. When the sugars on the *West Cheswald* arrived, goods for which buyers were willing to pay twenty-two cents a pound at contract date, would fetch no more than eleven cents.

This fact does not affect the legal questions involved, but it does explain why consignments of sugar on the *Chifuku, Washington* and *Cheswald* gave rise to a rather remarkable mass of litigation. Efforts to avoid accepting and/or paying for these sugars have taken several forms: First, suit by the vendee to get back from Lamborn the sale price obtained by him from the banks issuing the irrevocable credits. This case is of that sort, and so were *Wilbur & Sons, Inc.* v. *Lamborn,* 276 Penn., 479, and *Lamborn* v. *Hardie Co.,* 1 Fed. 2d, 679. The second form of attack consisted in a vendee's suing to prevent his own bank paying under its own irrecovable letter of credit. *J. Hungerford Smith Co.* v. *Lamborn,* 200 N. Y. Sup., 292,

and *Williams Ice Cream Co.* v. *Chase, etc. Bank,* 210 A. D., 179, are such cases.

In a third form of litigation Lamborn brought suit against the credit issuing bank, which on varying grounds had refused the promised payment. Such cases are *Lamborn* v. *The Lake Shore, etc. Co.,* 196 A. D., 504, and *National Bank, etc.* v. *Lamborn,* 2 Fed., 2d, 23. In every instance except the last Lamborn has prevailed.

In that case the credit, according to the report, required "shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia." There, as here, the sugar tendered f.o.b. Philadelphia was *ex West Cheswald* but as that steamer had originally sailed from Java for New York and been diverted to Philadelphia by radio, the Fourth Circuit held that the credit-giving bank was justified in refusing payment because there had been no shipment from Java to Philadelphia.

There is also a report of the present litigation, on plaintiff's motion to strike out certain defenses. (*Matthew Smith, etc. Co.* v. *Lamborn,* 276 Fed., 325.)

On the present writs we are urged *first* to construe the contract between vendor and vendee as the Fourth Circuit did that between vendor and bank, and *second* to sustain the contention pleaded below by the plaintiffs-in-error, *i. e.,* that after shipment of sugar satisfying shipment on the *Chifuku,* Lamborn was powerless to tender sugars shipped on the *Cheswald.*

As to the first point we could not yield to the argument even if we wished to. This is not a suit between the vendor and the credit-issuing bank; the existence of that credit is immaterial to the present action. We note, how-

ever, that the credit letter in this record does not contain the proviso above quoted from the Fourth Circuit case; and even if it were there we could not consider it as a defense, because it was not pleaded nor suggested as a reason for Smith's refusing the sugar.

This suit does not rest on the credit in any way, it is not denied that Lamborn was entitled to his money *under the credit*, but he is alleged to have gotten it only after he had broken his sales contract. There were two quite distinct contracts, one for the sale and one for payment by another person. As was said in *Lamborn* v. *Lake Shore, &c. Co., supra* (at p. 606):

> "The authorities are uniform to the effect that this letter of credit constitutes the sole contract with the shipper, and that the bank issuing the letter of credit has no concern with any question which may arise between the vendor and vendee of the merchandise for the purchase price for which the letter of credit was issued."

Consequently we are not required to express assent or disagreement with the opinion of the Fourth Circuit.

On the other question, the single issue arising on the pleading, we are of opinion that Lamborn had good right to tender sugar *ex West Cheswald*, and have little to add to the opinion of HAND, J. in 276 Fed., 325.

The sale contract was mercantile, is to be construed according to the intent of the parties, and we must discover by the language used what warranties, or conditions precedent were created. (*Dorrance* v. *Barber*, 262 Fed., 489.)

There was no warranty that the same steamer would carry Smith's sugar all the way from Java to Philadel-

phia; by express agreement it might have gone on several vessels, and by reasonable construction been forwarded by another steamer from an intermediate port; *e. g.* the *Chifuku* could have transshipped at Port Said. (*Harrison* v. *Fortlage*, 161 U. S., 57.)

The naming of the *Chifuku* as the carrying vessel bore no resemblance to the naming of a vessel to fulfil a charter party, where the vessel itself was the subject matter of agreement. *Texas Co.* v. *Hogarth, &c. Co.*, 256 U. S. 619, has no application.

In short the provision of the sales contract "names * * * of steamers to be declared later," was for the seller's benefit only, and he could waive it. The cases were cited below, but see also *Borrowman* v. *Free*, 4 Q. B. D., 500.

Reduced to its lowest terms Smith Company was entitled to a certain quantity of Java sugar, f.o.b. Philadelphia, and shipped in August-September; that agreement was fulfilled.

Judgment affirmed with costs.

Exhibit "C."

Decided Oct. 21, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

NATIONAL BANK OF COMMERCE OF NORFOLK,
Plaintiff-in-Error,
v.
ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, VICTOR R. HESS, N. NELSON KEEN, B. WHEELER DYER and WILLIAM V. WOOD, partners trading and doing business as LAMBORN AND COMPANY,
Defendants-in-Error.

ROSE, Circuit Judge:

This is another sugar case. Those concerned in the transactions out of which it arose will be referred to as the Seller, the Buyer and the Bank. Only the first and last of these are parties to this litigation. The Seller was plaintiff below and is defendant in error here. It is a partnership trading as Lamborn & Co. and is composed of nearly a dozen persons, everyone of whom is a citizen of some other state than Virginia.

On the 23rd of April 1920, it entered into a written contract with the Buyer, Southgate & Co. of Norfolk, Virginia, by the terms of which it sold the latter 1,000 bags of Java White Sugar of about 224 pounds to the bag,

10% more or less at 22c. per pound, duty paid f.o.b. cars Philadelphia, landed weights. The sugar was to be shipped during August/September at the option of Seller from Java, by steamer or steamers were to be declared later. Should the steamer or steamers declared against the contract fail to arrive at the port of destination for any cause, Seller was to be relieved of responsibiilty under the contract. It was further provided that in case there was damage to the sugars in transit to Philadelphia preventing Seller from making full delivery, Seller was to deliver to each purchaser of sugar aboard that steamer a proportionate part of the sound packages. Payment was to be made net cash on presentation of sight draft with invoice and bill of lading attached. Buyer was to open within five days, confirmed irrevocable letter of credit in favor of Seller for the full invoice value of the 1,000 bags. If unforeseen circumstances, such as embargoes, Government supervision or interference, accidents, fires, strikes, car shortages, riots, stress of weather, etc., prevented shipment within the time specified, the Buyer had the option of cancelling the portion of the contract affected by the delay or taking the sugar so affected for later shipment without claiming damages. The Buyer's decision was to be given immediately upon advice of the Seller that delay had occurred. In the event of such cancellation by the Buyer, the Seller was to be under no further obligation under the contract.

A letter of credit was promptly opened but because it was not worded in some respects as the Buyer and Seller desired, it was withdrawn and another dated May 11, 1920, was issued in its place by the Bank, the National Bank of Commerce of Norfolk, Virginia. It is upon this latter document that the Seller is here seeking to recover from

the Bank. It was for $53,123.84, a sum arrived at by figuring what the Buyer would owe the Seller if the amount of sugar exceeded by the permissible 10% the 1,000 bags at 224 pounds each. In that event there would be delivered 246,000 pounds of sugar which at 22c. per pound would foot up $54,208.00, from which by the terms of the contract, 2% or $1,084.16 would be deducted leaving the amount for which letter of credit was issued. Apparently when the letter was received by the Seller it did not notice that it contained the provision that before payment could be demanded by the Seller, the latter must present to the Bank or rather to the Bankers Trust Co. of New York through which the credit was made payable, a sight draft with invoice and copy of ocean bill of lading covering shipment Java to Philadelphia and order notify bill of lading, the latter bill of course being the one to be issued by the railway carrier to whom in accordance with the contract the sugar was to be delivered f.o.b. cars at Philadelphia. In the contract the Seller had bargained to attach to the draft only the invoice and bill of lading by which it understood the railroad bill. When the Seller realized that the letter of credit required it to present with its draft a copy of the ocean bill of lading as well, it took up the matter with the other parties, writing on the 10th of June that the sugar was being shipped from Java in cargoes of thousands of tons as each cargo would include the sugars intended for a number of different purchasers, it would be impracticable to furnish to each of these a copy of the ocean bill of lading. Some correspondence ensued and finally on the 15th of July, the Bank notified the Seller that it had been authorized by the Buyer to eliminate the copy of the ocean bill of lading

covering shipment from Java to Philadelphia. It added that all other terms and conditions in the credit were to remain as heretofore. One of these other terms which consequently was unchanged was that which was headed "Shipment" and which reads as follows: "Shipment to be made during August/September 1920 at option of the Sellers from Java by steamer or steamers to Philadelphia." When in December the sugars arrived in Philadelphia and were put upon the cars and the Seller's draft was presented, the Bank refused payment. It says that it was entitled to do so because the sugars were not shipped from Java to Philadelphia.

There is no dispute as to facts. The controversy is as to the legal effect of that which admittedly took place. On the 30th of August, the Seller had notified the Buyer that the sugars were going forward by the *Chifuku Maru* or the *Washington Maru* or substitutes. Nearly a month later and within one day of the expiration of the time during which the Seller was bound to ship the sugar from Java, it wrote the Buyer that the *Chifuku Maru* was carrying the latter's sugars and was due to arrive the latter part of October. On November 10th, it again wrote the Buyer that the sugars were to arrive in Philadelphia the last half of November on the Steamship *Chifuku Maru.* There was shipped in that steamer from Java to Philadelphia, a full cargo of sugar including much more than the amount which the Seller had contracted to deliver to the Buyer. Unfortunately the Steamship developed engine trouble of so serious a character, that it became evident that it might be forced to remain at Port Said for an indefinite period. The Seller had on board the Steamship *West Cheswald* sugars which before the end of September had been shipped on her from Java to New York. On the 11th of

December that vessel was within about three days sail of her destination. The price of sugar had by that time fallen to a fraction of that which the Buyer had agreed to pay and doubtless the Seller was anxious that there should be no departure on its part from the terms of the contract, and it might be that the *Chifuku Maru* would never get to Philadelphia. It occurred to the Seller that the *West Cheswald* might be diverted from New York to Philadelphia and accordingly on the 11th the Seller took up the matter with the agents of that ship and asked whether such agents would consider the sending of her to Philadelphia instead of to New York. The reply was it would all depend on how the Seller's sugars were stored. A radiogram was thereupon sent to the master of the ship directing him to radio immediately amount general cargo and sugar aboard, how stored, and if Lamborn's sugar could be discharged without moving other cargo. He replied that the Lamborn's sugar would be available without moving other cargo and must be discharged first, and added the ship was due to arrive about December 14th. At the time the ship was somewhere in the neighborhood of the Bermudas. The shipping Board which was the owner of the *West Cheswald* was communicated with and asked if it would consider sending that ship to Philadelphia instead of New York. The Board authorized the diversion of the steamer to Philadelphia at an additional freight charge of $1.00 per ton and on the afternoon of December 13, the Seller accepted the Shipping Board's terms and agreed to pay $3,572.00 the extra freight on its sugars. Thereupon, on the 13th, the *West Cheswald* by radio was directed to proceed to Philadelphia. The ship reached the Delaware breakwater

by midnight of the 14th and apparently arrived at Philadelphia a few hours later.

The Courts, State and Federal, in at least four other cases, have had before them tenders, by this Seller under similar contracts to that here involved, of sugars brought by the *West Cheswald* to Philadelphia. Wilbur *v.* Lamborn 276 Pa. State 479, Matthew Smith Tea, Coffee & Grocery Co. *v.* Lamborn, 276 Fed. 325, Smith *v.* Lamborn 200 N. Y. Supp. 292, Williams Ice Cream Co. *v.* Chase National Bank 199 N. Y. Supp. 314, affirmed by the Appellate Division of the Supreme Court of New York for the First Department in June of this year, in an opinion which we have seen but which has not yet been reported. In every one of these as well as below in the instant case, it was held the buyers were bound to receive and pay for the sugars. In most of them the question principally discussed was whether the Seller had the right under the contract to declare the *West Cheswald* as and when it did. The Buyers contended that letters of August 30, September 29 and November 10 from the Seller, identical in phraseology with those of the same dates above referred to, amounted to a final declaration of the *Chifuku Maru* which could not be subsequently changed without the consent of both Buyer and Seller. That particular defense is not open to the Buyer in the instant case because its letter of credit contains no requirement for a declaration. Apparently the letters of credit procured by the buyers in the other litigated cases were equally silent on that point, a circumstance which doubtless explains why in them the controversy took the form either of an application by a buyer for an injunction to prevent payment on the letter of credit or of a suit by the buyer against the seller to recover what the latter had received upon

such letter. The right of the Seller to declare the *West Cheswald* when and as it did was sustained by every one of the Courts which felt called upon to pass upon that question. It is not before us and we are not called upon to say anything about it.

In two of the cases, namely, Smith *v.* Lamborn, *supra* and Wilbur *v.* Lamborn, *supra*, as well as by the learned Judge below in the one now at bar, something was said as to the contention upon which we are required to pass, namely, whether the "shipment" of sugars on the *West Cheswald* was made "from Java by steamer or steamers to Philadelphia." In the jurisdictions other than this, each of the Courts apparently felt that the answer it gave was so obviously correct as to require the support neither of discussion nor of authority.

In Williams Ice Cream Co. Inc. *v.* Chase National Bank, the learned Judge in the Court of the first instance who heard the case thought it sufficient to say "the plaintiff urges the sugar was not a shipment from Java to Philadelphia, but to New York. In other words the shipment is not the course that a designated vessel takes but the course it was intended it should take. This refinement it seems to me is more one of sophistry than reason and carries with it a failure of conviction." In the Appellate Division this particular point is not noticed at all. The Supreme Court of Pennsylvania in Wilbur *v.* Lamborn was almost as brief. "Some point is made of the fact that the *West Cheswald* was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence under the contract. Plaintiff was concerned only with the delivery of the merchandise and that there should be no delay in its arrival. It was delivered as the result of a continuous voyage from

Java to Philadelphia. These contracts did not say that the sugar shall be shipped by continuous voyage from the place of shipment to the destination, what they provide is that the shipment shall be from Java by steamer or steamers to Philadelphia. Even if they did so provide, we might not be prepared to hold—under the facts here appearing that the voyage was not in reality a continuous one—although the first destination of the ship was New York—that this latter circumstance would avoid the contract." From the report of the case it appears that Filley *v.* Pope 115 U. S. 213 was cited by counsel but is not referred to by the Court. In the instant case the learned Judge below said "the letter of credit is complied with it seems to me by the shipment within a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I cannot imagine that the contract contemplates or requires that there must have been all the time from the inception of the voyage, an intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me it would be in compliance with the contract. It would be all that reason and fair play and justice would require. I was very much interested in the Supreme Court case and of course if it is parallel with this, I shall have to follow it and be bound by it, but I do see a difference in a shipment from Leith and a shipment from Glasgow. The delivery of this shipment to New York would have been unquestionably a non-compliance with the contract which would have avoided this letter of credit so the shipment of this sugar from some other point than Java would have been a non-compliance with the contract notwithstanding the precise quantity and the

precise quality of sugar was furnished but to say that although the exact terms of the contract were complied with because it was not the purpose or not the intention or not the arrangment that what was done should be done at the beginning vitiated this guarantee, it seems to me is going further than I think I have the right to go." The Supreme Court case referred to in the above quotation was of course Filley *v.* Pope, *supra.* In it a Scotch iron master by contract with a resident of St. Louis, sold the latter 500 tons of pig iron and undertook that shipment should be from Glasgow as soon as possible. It appeared that the seller's iron works were about equally distant from Glasgow on the west coast of Scotland and from Leith on the east, and that in the ordinary course of trade, shipments were made indifferently from either. At the time of the sale, no vessel from Glasgow was immediately available and the only ship by which prompt transportation was possible was about to leave Leith. The seller accordingly put the iron upon her and it arrived at its destination earlier than it could possibly have done had it gone from Glasgow. The trial Court held that the provision "That the iron was to be shipped from Glasgow was not a material provision," "that the purpose of the contract was the sale" of certain quantity of iron to be delivered at a certain place and that the fact "that it was shipped from Leith instead of Glasgow was not material to the rights of the parties." That point of view is in substance the same as that which has commended itself to the Courts which have heretofore passed upon the precise question now before us. They have thought that if within a reasonable time the sugar was carried to Philadelphia by a vessel which in fact sailed from Java to Philadelphia, it made no difference that when the ship-

ment was made in Java, it was upon a ship which was bound on a voyage not to Philadelphia but on one to New York. In Filley *v.* Pope, however, the Supreme Court held that the contract was a mercantile one, as that now at bar is, and that in such a contract "a statement descriptive of the subject matter or some material incident such as time or place of shipment is ordinarily to be regarded as a warranty or a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."

Referring to the case of Norrington *v.* Wright, 115 U. S. 188, decided on the same day, Mr. Justice GRAY said that "the provision in that case related to the time; in this it relates to the place of shipment," as in the case now at our bar it related to the place to which the shipment was to be made. The Supreme Court said it was not "merely 500 tons of iron of a certain quality" that was sold, nor was "it such iron to be shipped as soon as possible from any Scottish port or ports, but it 'was' iron of that quality to be shipped from the particular port of Glasgow as soon as possible." "The Court has neither the means nor the right to determine why the parties in their contract specified shipment from Glasgow, instead of using the more general phrase of shipment from Scotland or merely shipment without naming any place, but it is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment nor does the buyer agree to accept iron shipped via any other port. The buyer takes the risk of delay in getting shipment from Glasgow or of delay or disaster in pro-

curing the voyage from Glasgow to New Orleans, but he does not take the risk of delay or of sea perils which may occur in the course of a different voyage from Leith to the same destination."

"One or two illustrations may help to make this clear. If the sellers had shipped the iron at the first opportunity from Glasgow, the buyer could not have refused to accept it even if it could have been shipped sooner from Leith. Again, the buyer would have an insurable interest in iron during the voyage by reason of the title which would accrue to him under the contract on arrival and delivery and of the profits that he might make in case of a rise in the market but a policy of insurance on the iron for a voyage from Glasgow would not cover a voyage from Leith." Just as in this case although the title to the sugar was not to pass until its delivery f.o.b. cars Philadelphia, the buyer had an insurable interest in it and had the sugar market continued to advance, he might well have desired to insure the gain he would make from his contract, and insurance affected on sugar from Java to Philadelphia would not have covered sugar on a ship bound for New York. Murray *v.* Columbian Insurance Co. 4 Johns. 443.

In the case before us the parties had definitely bargained for a "shipment" "from Java *to Philadelphia*" as in Filley *v.* Pope they did for a shipment "*from Glasgow.*" Some of the Courts which have upheld the contention of the Seller in cases arising out of sugars tendered from the *West Chesuald* have done so because in their views whether the shipment was to Philadelphia depended on the voyage the ship actually made and not upon the one she started out to make and for which she issued her

bills of lading. If they are right, they were of course justified in holding that Filley *v.* Pope was not a controlling authority. The Bank, however, argues that in mercantile contracts such as this the word "shipment" has a definite meaning. When it is used in connection with the time or place at or the destination to which it is to be made, it has reference to the conditions which existed at and before the sailing of the ship and that therefore the sugar tendered under the letter of credit was a shipment not "to Philadelphia" but to "New York." If that be so, Filley *v.* Pope is necessarily decisive of the controversy.

In Norrington *v.* Wright, *supra*, the Supreme Court cited with approval Bowes *v.* Shand, 2 App. Cases 455. In that case a contract was made in London, for the sale of 6,000 tons of Madras rice to be shipped at Madras or coast during the months of March and/or April, 1874, per *Rajah of Cochin*. The 6,000 tons filled 8,200 bags of which 7,120 were put on board and bills of lading signed in February and for the rest, consisting of 1,030 put on board in February and 50 in March, the bill of lading was signed in March. The House of Lords held the seller could not require the buyer to accept the rice because the meaning of the contract, as apparent upon its face, was that all of the rice must be put on board in March and April or in one of those months. The shipment took place when the rice was put on board the ship and what was then done, determined the time and character of the shipment, precisely as whether the shipment of the sugar in the case at bar was made to New York or Philadelphia was necessarily determined when the sugar being on board the ship, the bills of lading for it were issued.

In answer to a suggestion similar to one which seems to have had much weight with some of the Courts which have considered the contract now in controversy, viz., that it made no difference to the Buyer whether the sugar was originally consigned to New York or to Philadelphia, Lord Chancellor CAIRNS said, "It does not appear to me to be a question for your Lordships or for any Court to consider whether this is a contract which bears upon the face of it some reason, some explanation why it was made in that from and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing in their contracts stipulations to which they do not attach some value and importance. If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace that literal meaning to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that it is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices have dropped. The non-fulfillment of any term of the contract is a means by which a purchaser is able to get rid of the contract when prices have dropped but that is no reason why a term which is in a contract should not be fulfilled." In the same case that eminent authority on the law of sale, Lord BLACKBURN said "if the description of the article tendered is different in any respect it is not the article

bargained for and the other party is not bound to take it. I think in this case what the parties bargained for was rice shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras; probably equally good rice might have been shipped in February as was shipped in April, and I dare say, equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*, but the parties have chosen, for reasons best known to themselves, to say we bargained to take rice shipped in this particular region, at that particular time, on board that particular ship and before defendants can be compelled to take anything in fulfillment of that contract, it must be shown not merely that it is equally good, but that it is the same article they have bargained for otherwise they are not bound to take it."

The same principle was applied by Lord Chief Justice RUSSELL in Ashmore & Son *v.* Cox & Co. L. R. 1899, 1 Q. B. 436. In that case 250 bales of Manila hemp were sold, shipment to be made from a port or ports in the Philippine Islands by sailer or sailers, direct or indirect to London between May 1 and July 31. No hemp was shipped by the seller by sailer or sailers, nor during the time limited, but on September 15, it did ship 250 bales of Manila hemp by a steamship which was expected to arrive and did arrive in London about the same time as the sailing ship would have arrived, had it sailed July 31. It was held that the date of shipment and that it was to be made by a sailer or sailers was binding. In that case it was urged precisely as it has been at bar, that all the buyer was interested in was that goods of the kind

and quality he had bargained for should arrive at the time and place originally contemplated.

Few men have been more deeply learned in mercantile law than Mr. Justice SCRUTTON. In Landauer *v.* Craven & Speed Bros. L. R. 1912 2 K. B. 94, he passed upon a case in which 500 bales of Manila hemp had been sold for delivery at London. The terms of the contract gave much liberty to the seller and by so doing indicated that the buyer was chiefly interested in the ultimate delivery of the hemp to him. It was agreed the shipment might be made from any recognized shipping port or ports in the Philippine Islands or from Hong Kong or Singapore at any time within a three months interval between October 1 and December 31. The shipment might be direct or indirect. It was in fact made from Manila in due season but on a bill of lading which called for delivery at Hong Kong. At the last named port, subsequently to December 31, the hemp was put upon another ship and there was issued for it a new bill of lading from Hong Kong to London. Mr. Justice SCRUTTON held that the seller was bound within the time named in the contract to ship at the port of shipment goods of the description contained in the contract and on shipment to procure a contract of affreightment under which the goods would be delivered at the destination contemplated by the contract. He said if when the seller ships goods c.i.f. London, he has no contract for carriage to London but only an intention to make one, he cannot forward this and tender an intention to the buyer. He further said that a seller C.I.F. must ship his goods under a contract for conveyance to the port of destination which can be transferred and not under a contract for part of the way and to take another which cannot be transferred.

Now it is true as it is pointed out by the learned counsel for the seller that the contract here is not a C.I.F. contract but it is one under which the Buyer had an insurable interest and is therefore one which so far as this question is concerned is governed by the same principle. Moreover, at all events, Landauer *v.* Craven & Speed is one of the many cases which hold that the character of the shipment is fixed at the time it is made, a principle which has received new and recent affirmation by the House of Lords in Hansson *v.* Hamel & Horley L. R. 1922 2 App. Cases 36.

We in the past have had more than one occasion to hold that in mercantile contracts the Courts must give effect to every term in the bargain the parties have chosen to make and are not at liberty to speculate whether they did or did not attach importance to something they wrote. As for example in The Manhattan 284 Fed. 310, we accepted as settled law that a purchaser of grain to be shipped by one ship could not be required to take it if it came in another and that we could not inquire whether every possible purpose of the buyer would not be as well served by that which was brought in the substitute. From much which was said by the tribunals which have heretofore passed upon the obligation of buyers to accept sugar from the *West Cheswald,* it would seem that it is at least possible that their conclusions were influenced not a little by their natural desire to prevent on a rapidly falling market purchasers from escaping from a bad bargain by taking advantage of a variation from the terms for which they in fact cared nothing. Such considerations have much less weight in construing and enforcing the agreements of business men than the Courts may properly give to them when they are called upon to deal with

contracts of a less strictly mercantile character. In this respect we can add nothing to what has been so forcibly said in the quotations made from Mr. Justice GRAY in this country and from Lords CAIRNS and BLACKBURN in England. Our examinations of the cases which in this country and across the water have put a definite interpretation on the meaning of the word "shipment" as used in contracts of the character of that with which we are here concerned, has convinced us that the instant case is not distinguishable from it and is governed by what the Supreme Court there said.

It follows that the learned Court below erred in rejecting the prayer of the defendant for a directed verdict in its favor and in consequence, the judgment below must be reversed and the case remanded for a new trial.

Reversed.

Exhibit "D."

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 2452.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE C. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER, surviving partners of the copartnership Firm of LAMBORN & COMPANY,
Plaintiffs-in-Error,

versus

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or Corporation, created by and under the Acts of Congress of the United States,
Defendant-in-Error.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued January 25, 1926. Decided October 19, 1926).

Before—WADDILL, ROSE and PARKER, Circuit Judges.

LOUIS O. VAN DOREN (Baird, White & Lanning; Edward R. Baird, Jr.; H. G. Connor, Jr. and Van Doren, Conklin & McNevin on brief) for Plaintiffs-in-Error, and TAZEWELL TAYLOR for Defendant-in-Error.

ROSE, Circuit Judge:

This is the second time this case has been here. What has been said (2F) (2d) (23) need not be repeated.

At the new trial the learned District Judge thought that the plaintiffs had offered no admissible testimony strengthening the case once held insufficient and he directed a verdict for the defendant.

The plaintiffs assign seventeen errors which resolve themselves into three contentions.

ALLEGED WAIVER BY THE DEFENDANT.

The plaintiffs say that defendant waived its right to rely upon the defense which we held decisive in its favor. The argument is, the defendant when it refused to honor the letter of credit assigned reasons for its conduct, and among them it did not include the fact that the sugar had been shipped from Java to New York and not to Philadelphia. It requires a rather narrow construction of what defendant did and said to justify a holding that the objections it made did not cover the defense upon which it now relies. The claim of the plaintiffs that if in the first instance their attention had been more pointedly called to it, they could and would have tendered sugar which had been originally consigned to Philadelphia, depends upon doubtful questions of law and speculative assumptions of fact. It is also worthy of note that while plaintiffs insist that defendant may not amend or supplement its out of Court statement of its grounds of defense, they claim that they are free to raise a point at the second trial which they did make at the first. In the former trial below and in this Court, the plaintiffs treated the defense in question as properly before the

Court. They as well as their adversary argued it elaborately. It is true they said it was bad in law, but no hint was given that the defendant was estopped from setting it up. It was given the full and painstaking consideration as well of the District Court as of this. Under these circumstances the learned Judge below did not err in rejecting the contention now made.

EVIDENCE AS TO CUSTOM OF TRADE.

After the case was remanded to the District Court the plaintiffs asked leave to amend their motion for judgment, a pleading which, under the modern Virginia practice, may take the place of a declaration at common law. They wished to insert in it a properly phrased allegation that there was in the trade in imported sugars a custom by which a provision that sugar should be shipped from a foreign port to one seacoast city in this country was understood to permit the doing of what the plaintiffs did. In the exercise of his discretion the learned District Judge refused to permit the amendment to be made. In so doing he said among other things

> "The Circuit Court of Appeals in this case in a very elaborate opinion has decided the meaning of the precise language in the contract that is now sought to be construed differently by virtue of proof of custom or intent. The effect of allowing an amendment of this kind at this time would be, if it were sustained by proper evidence to have a case in which the Circuit Court of Appeals had construed a contract of sale, in which they found no ambiguity, no difficulty in determining the precise and exact meaning of the parties and had finally concluded what the parties themselves meant and intended by the contract and having that determina-

tion before me, to find that it meant something entirely different, that its language was not plain and unambiguous, that there was something about it so obscure that it required the introduction of evidence of a custom to determine what it did mean and finally determining that it meant something different from what the Circuit Court of Appeals had decided, would be a thoroughly anomalous condition of affairs. Hence it seems to me that to allow this amendment to be made now would be a purely idle thing, a useless thing since in the very nature of things when the evidence to support it came to be introduced an objection would be made on the ground of its inadmissibility because the instrument speaks for itself, does not require the aid of custom to interpret it, and would therefore have to be overruled and refused admission on that account."

We see no occasion to add anything to this clear statement which is also a complete answer to such of the assignments of error as are directed to the exclusion of the subsequently offered testimony as to the custom in question.

EVIDENCE AS TO UNDERWRITING PRACTICE.

The refusal of the Court to receive proffered evidence as to underwriting practices is not open to attack here. That testimony did not bear upon any issue in the case, except in the most remote way. It was at best directed to a purely collateral matter. Its exclusion could not have prejudiced the plaintiffs and was well within the discretion of the trial Judge.

AFFIRMED.